SUPREME COURT U. S.

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 514

CESAR ARTURO RAMIREZ,

Petitioner

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID CARLINER
Warner Building
Washington, D.C. 20004
Attorney for Petitioner

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v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which sustains an order of the Board of Immigration Appeals denying petitioner both permanent residence in the United States as well as permission to depart the United States voluntarily.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and is set forth at pages 11-13 at Appendix A. The opinion of the Board of Immigration Appeals is set forth at pages 15-17, at Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1969 (Appendix B, p. 14). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *Jordan v. DeGeorge*, 341 U.S. 223, resolved the constitutionality of the term "crime involving moral turpitude" as it appeared in a predecessor of the Immigration and Nationality Act.

2. Whether a statute which provides that an alien shall be ineligible to receive a visa if he has been convicted of a "crime involving moral turpitude" is void as an indefinite delegation of power to an administrative agency.

3. Whether the term, "crime involving moral turpitude" is void as vague, in a statute which determines eligibility for permanent residence in the United States.

STATUTE INVOLVED

Section 212(a) of the Immigration and Nationality Act, 8 U.S.C. 1182(a) in pertinent part provides:

> ". . .The following classes of aliens shall be ineligible to receive visas. . . .
>
> * * *
>
> (9) Aliens who have been convicted of a crime involving moral turpitude . . ."

STATEMENT

Petitioner is a native and citizen of Ecuador who was last admitted to the United States as a visitor on February 23, 1965. In August, 1965, he applied under the provisions of

8 U.S.C. 1255 to change his status to that of an alien who has been lawfully admitted for permanent residence. During subsequent administrative proceedings, a special inquiry officer denied the application in the exercise of his discretion and ordered the petitioner to be deported for having overstayed his permission to remain in the United States. On appeal, the Board of Immigration Appeals declined to determine whether the petitioner should be granted permanent residence as a matter of discretion. It ruled instead that the petitioner was statutorily ineligible for the exercise of discretion because he had been convicted upon two informations in the District of Columbia Court of General Sessions of the offense of false pretenses for which he was given a suspended sentence of six months. The Board ruled that the petitioner had been convicted of two crimes involving moral turpitude, was therefore ineligible to receive an immigrant visa pursuant to 8 U.S.C. 1182(a)(9), and as a result is precluded by 8 U.S.C. 1255(a)(2) from eligibility for permanent residence and by 8 U.S.C. 1244(e) from being granted permission to depart the United States voluntarily. (Appendix C, pp. 15-17).

In a review of the Board of Immigration Appeals' decision in the court below, petitioner challenged the validity of Section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9), upon which the Board relied for its decision, upon the grounds that the terms of the statute are void both because they are vague and because they delegate an indefinite power to an administrative agency.

The District of Columbia Circuit held that "this challenge to the statutory standard is foreclosed to (that) court by *Jordan v. DeGeorge*, 341 U.S. 223" . . . (and) . . . deeming the Supreme Court to be now the proper forum for presentation of (petitioner's) contentions . . . (did not) consider them on the merits." (Appendix A, pp. 12-13).

PETITION FOR A WRIT OF CERTIORARI

REASONS FOR GRANTING THE WRIT

The question presented here—whether an alien may be denied permanent residence in the United States because he has been convicted of a "crime involving moral turpitude"—has far reaching consequences in the administration of the immigration and deportation laws and a profound impact upon the lives of nonimmigrant aliens residing within the United States.[1]

The court below did not decide petitioner's two-pronged challenge of the phrase as it appears in Section 212(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9): that it is vague and that its delegation of power to an administrative agency is not sufficiently definite. Instead, concluding that *Jordan v. DeGeorge*, 341 U.S. 223, had foreclosed the issue, it deferred to this Court as the proper forum for the presentation of the questions.

1. The question at the thereshold—and a substantial reason for the grant of certiorari—is the construction to be given to the Court's holding in *Jordan v. DeGeorge*.

The court below states that this Court "upheld the statute as constitutional" (Appendix A, p. 13). But this Court's opinion in *DeGeorge* explicitly notes, at 341 U.S. 229, that the question posed here "was not raised by the parties nor argued before this Court."

The majority opinion did, of course, treat the issue of vagueness raised *sua sponte* by the dissenting opinion of three members of this Court, 341 U.S. 232, and it held both that fraud is encompassed within the meaning of the term "moral turpitude" and that Congress had provided sufficient warning that deportation would be the consequence of twice defrauding the government of taxes.

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[1] The case here is to be distinguished from *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118, which held that the exclusion of an alien with a "psychopathic personality" applied there to conduct *prior to entry* (the Supreme Court's emphasis). The petitioner's offending conduct here was after his entry.

Whether the ruling there is to be regarded as a definitive disposition of the constitutional questions raised here, but notably not raised by the parties there, seems questionable, especially in view of the opening sentence of this Court's opinion:

> "This case presents only one question: whether conspiracy to defraud the United States of taxes on distilled spirits is a "crime involving moral turpitude" within the meaning of Section 19(a) of the Immigration Act of 1917." 341 U.S. 223.

This Court has not had occasion since to explicate the thrust of its decision. See *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32. In view of the continuing importance of the term in the administration of the immigration and deportation laws, it is urged that any uncertainty regarding the reach of the holding in *Jordan v. DeGeorge* should be resolved.

2. Apart from the question whether *Jordan v. DeGeorge* has decided the questions raised here, recent decisions involving delegation of powers and the void for vagueness doctrine suggest that a reexamination of the issue may be in order.

United States v. Robel, 389 U.S. 258, concurring opinion, Brennan, J., at 269, 273, points out that while Congress may undoubtedly delegate substantial powers under the broadest of standards, when the regulation affects fundamental rights, "the area of permissible indefiniteness narrows". To the same effect, indeed, is the application in *Jordan v. DeGeorge*, 341 U.S. 223, 231-232 of the vagueness doctrine to deportation proceedings.

See also *United States v. Rumely*, 345 U.S. 41; *Panama Refining Co. v. Ryan*, 293 U.S. 388; *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465; *Bantam Books v. Sullivan*, 372 U.S. 58; *Schecter Poultry Corp. v. United States*, 295 U.S. 495, *Gojack v. United States*, 384 U.S. 702; *NAACP v. Button*, 371 U.S. 415; *Greene v. McElroy*, 360 U.S. 474 in which the Court has dealt with "vague legislative directives" in a variety of situations.

The decisions indicate, as Mr. Justice Brennan's concurring opinion in *Robel, supra,* at 272-274, observes, that there must be "a legislative judgment . . . on the extent to which the prophylactic measure should be applied" (*Cantwell v. Connecticut,* 310 U.S. 296); that the absence of procedural safeguards in the application of the power is a factor in determining the statutory construction of the standards, (*Watkins v. United States,* 354 U.S. 178, 205); and that the "legislative directive must delineate the scope of the agent's authority so that those affected by the agent's commands may know that the command is within his authority and is not his own arbitrary fiat (*Cramp v. Board of Public Instruction,* 368 U.S. 278). See especially *Oestereich v. Selective Service System, etc.,* 393 U.S. 233.

None of these factors was considered in this Court's opinion in *Jordan v. DeGeorge.* In sketching the legislative history of Section 19(a) of the Immigration Act of 1917, Justice Jackson's dissent in *DeGeorge,* 341 U.S. 233, commented that "Congress knowingly conceived (the uncertainties) in confusion". The legislative history which preceded the Immigration and Nationality Act of 1952 indicates that the earlier confusion had never been resolved.

(a) Thus Congress was informed that the term "moral turpitude" is determined by the Attorney General "as those standards have been announced in the decisions of our courts" (39 Op. Atty. Gen. 95), and that, on the one hand, it involved "an act intrinsically and morally wrong and 'malum in se' " or which is "contrary to justice, honesty, principle, or good morals", and on the other hand, that whether such an act involved moral turpitude depended upon where it was committed. See S. Rep. 1515, 81st Cong. 2d Sess. pp. 350-354.

As to those aliens whose eligibility to visas is determined by consular officials (See 8 U.S.C. 1104(a)), Congress was informed that "while the visa instructions defined moral turpitude as an act which in itself is one of baseness, vileness, or depravity, the applicability of the excluding pro-

vision often depends on what the individual officer considers to be baseness, vileness, or depravity" ibid., p. 353.

Nonetheless, and in the knowledge of the observation in *U.S. ex rel. Mylius v. Uhl,* 203 Fed 152, aff'd. 210 Fed 860 that " 'Moral turpitude' is a vague term (and that) . . . its meaning depends to some extent upon the state of public morals," Congress chose not to refine the pre-existing language when it adopted 8 U.S.C. 1181(a)(9) in issue here and the same term in 8 U.S.C. 1252(a)(4).

(b) As in *Robel,* there is "persuasive", indeed conclusive evidence that Congress intended to commit to consular officers abroad the exclusive discretion to determine the issuance of visas. Thus 8 U.S.C. 1103(a) and 1104(a) provide an express limitation upon the power of both the Attorney General and the Secretary of State with regard to "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas". See also 8 U.S.C. 1255(c) as to natives of the Western Hemisphere.

It is usually not possible, therefore, for "affected persons within the procedural structure established . . . to be heard by the implementing agency and to secure meaningful review of its action in the Courts", (Concurring Opinion, Mr. Justice Brennan in *Robel* at 272. *Ma v. Barber,* 357 U.S. 185.

In this circumstance, a different consideration applies to the term "moral turpitude" as it appears in 8 U.S.C. 1251 (a)(4), where its application is made in an administrative proceeding safeguarded with the requirements of due process and is subject to judicial review, from that here where, except for the limited effect of 8 U.S.C. 1255(a), the intent of Congress is to bar review of the determination of "moral turpitude" within the meaning of 8 U.S.C. 1182(a)(9). Although in the former context, the courts have accepted limiting constructions in the statutory language in order to save legislation from unconstitutionality, *Beauharnais v. Illinois,* 343 U.S. 250; in the latter situation, the courts are "not

free to imply limitations upon (the Executive's) discretion or procedural safeguards that Congress obviously chose to omit" (Concurring opinion, Mr. Justice Brennan, *Robel* at 389 U.S. 276).

(c) There can be little doubt that a legislative directive to bar aliens who have been convicted of a crime involving moral turpitude fails to "delineate the scope of the agent's authority." Except for the reiteration of a dictionary definition that the term describes "an act of baseness, vileness, or depravity", no court has ever achieved a "workable definition" of those words. See Gordon and Rosenfeld, Immigration Law and Procedure, Section 4.13(a). As a result the courts have resorted to a "case by case exploration" of inclusion and exclusion of various crimes to determine what does and what does not involve moral turpitude, *ibid.* Regardless, whether a method of retrospective interpretation is available to determine if a defendant in a criminal trial has had "adequate forewarning" of the charge against him, (See *Pierce v. United States*, 314 U.S. 306; *Lanzetta v. New Jersey*, 306 U.S. 451; and *Smith v. Cahoon*, 283 U.S. 553); it is plain that the term affords no guidance to the Executive and therefore no basis for those affected to know whether the decision is "not within his own arbitrary fiat."

3. *United States v. Harriss*, 347 U.S. 612, 617 has recently restated the familiar principle that "the constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute".

The leading case of *Connally v. General Construction Co.*, 259 U.S. 385, 391 indicates that the question turns upon whether the statutes

> "employed words of phrases having technical or other special meaning, well enough known to those within their reach to correctly apply them . . . or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ . . . or . . . 'from the text of

the statutes involved or the subjects with which they dealt, a standard of some sort was afforded' ".

In *Jordan v. DeGeorge*, 341 U.S. at 230-231, the majority opinion significantly did not hold that the phrase "moral turpitude" came within the ambit of any of these requirements. Rather it observed merely that the term has "deep roots in the law" (at 227), and it held that whatever else it may mean, the phrase has "without exception been construed to embrace fraudulent conduct" (at 232). Thus the Supreme Court there looked to the "manner in which the term 'moral turpitude' has been applied by judicial decision" to ascertain whether fraud was an ingredient, rather than ascertaining, as *Connally* suggests, whether the term itself has a "well-settled meaning", or whether a "standard of some sort" was afforded.

It is questionable whether a statute which made it illegal to "commit any act involving moral turpitude" would be held valid by the use of a refining process to determine whether a particular offense would be known by an offender to be proscribed.

Musser v. Utah, 333 U.S. 95, 96-97 makes it clear that a statute which makes criminal a conspiracy "to commit any act injurious to the public health, the public morals, or to trade or commerce, or for the perversion or obstruction of justice, or the due administration of the laws . . . would seem to warrant conviction for agreement to do almost any act which a judge and a jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice, or order."

The standard here seems no less ambiguous, even with the customary judicial construction requiring that the acts be "base, vile, or depraved".

In *Pino v. Landon*, 349 U S. 901, this Court set aside an order of deportation because the term "convicted" in the statute had not been given a properly strict construction. In *Holzapfel v. Wyrsch*, 259 F.2d 890 (3rd Cir.), the Third Circuit declined to permit a conviction under a Sex Offen-

ders Act to be treated as a "crime" within the meaning of 8 U.S.C. 1251(a)(4).

If the term "moral turpitude" is vague standing alone in a criminal statute, it cannot become less so when incorporated in a phrase which requires a crime and a conviction. Were it so, then the requirement of strict definitions for the conviction of a crime would become a mockery, an emphasis upon form with an amorphous content.

These considerations, which were avoided in *Jordan v. DeGeorge*, warrant further examination by this Court in view of the manifest importance which the term "crime involving moral turpitude" has for aliens, as well as citizens, living within the United States.

CONCLUSION

For the reasons advanced, it is respectfully submitted that this petition for a writ of certiorari should be granted.

David Carliner
902 Warner Building
Washington, D.C. 20004

Attorney for Petitioner

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,346

CESAR ARTURO RAMIREZ, Petitioner

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, Respondent

Petition for Review of Order of the Immigration and Naturalization Service

Decided June 4, 1969

Mr. David Carliner for petitioner.

Mr. Paul C. Summitt, Attorney, Department of Justice, with whom *Messrs. David G. Bress*, United States Attorney at the time the record was filed, and *Frank Q. Nebeker*, Assistant United States Attorney at the time the record was filed, were on the brief, for respondent.

Before FAHY, *Senior Circuit Judge*, LEVENTHAL and ROBINSON, *Circuit Judges*.

PER CURIAM: Petitioner, who overstayed his permit to remain in the United States as a nonimmigrant visitor from his native country of Ecuador, of which he was also a citizen, has been ordered deported by the Immigration and Naturalization Service. On November 2, 1966, while the proceedings involving petitioner were pending before the Service, Congress amended Section 245[1] of the Immigration

[1] Pub. L. 89-732, § 3, 80 Stat. 1161, *amending* 8 U.S.C. § 1255.

and Naturalization Act. Under this amended provision petitioner applied to the Service for adjustment of his status to that of an alien admitted for permanent residence. The Special Inquiry Officer to whom his application was remanded by the Board of Immigration Appeals found petitioner deportable and denied his application for adjustment of status. His request to be permitted voluntarily to depart was also denied. Petitioner's appeal to the Board of Immigration Appeals was dismissed by order of the Board on the ground that under Section 212(a)(9)[2] petitioner was statutorily ineligible for the adjustment of status since he had been convicted of false pretenses with "intent to defraud," on each of two counts of an information under 22 D.C. Code § 1301. He now petitions this court for review of this order of the Board of Immigration Appeals.

The sole ground presented is that Section 212(a)(9), in using the standard "a crime involving moral turpitude" to create ineligibility for adjustment of status, is unconstitutionally vague, and is void as an indefinite delegation of power to an administrative agency.

We think this challenge to the statutory standard is foreclosed to this court by *Jordan* v. *DeGeorge*, 341 U.S. 223.[3] Though petitioner points to the statement of the Court in *DeGeorge* that the question of vagueness was not raised by

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[2]Section 212(a)(9), 8 U.S.C. § 1182(a)(9), provides in pertinent part:

> **§ 1182. General classes of aliens ineligible to receive visas and excluded from admission; . . .**
>
> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> (9) Aliens who have been convicted of a crime involving moral turpitude . . . .

8 U.S.C. § 1182(a)(9).

[3]*Cf. Local No. 6167* v. *Jewell Ridge Coal Corp.*, 145 F.2d 10, 13, *aff'd*, 325 U.S. 161. *But cf. Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251, 252-53 (S.D. W.Va.), *aff'd*, 319 U.S. 624.

the parties or argued, the Court, no doubt referring to the dissenting opinion, said ". . . it has been suggested that the phrase 'crime involving moral turpitude' lacks sufficiently definite standards to justify this deportation proceeding and that the statute before us is therefore unconstitutional for vagueness."[4] The Court then examined the application of the vagueness doctrine to the statute, notwithstanding the matter had not been raised by the parties or argued. The Court said it did this in view of the grave nature of deportation. Upon full consideration of the question the Court upheld the statute as constitutional,[5] especially in its application to "crimes in which fraud is an ingredient," the situation in petitioner's case. Deeming the Supreme Court to be now the proper forum for presentation of appellant's contentions we have not considered them on the merits.

Affirmed.

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[4] 341 U.S. at 229.

[5] *See Boutilier* v. *Immigration and Naturalization Service*, 387 U.S. 118, 131 (dissenting opinion of Mr. Justice Douglas).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,346 September Term, 1968.

[Filed June 4, 1969]

CESAR ARTURO RAMIREZ,
Petitioner,

v.

UNITED STATES IMMIGRATION
AND NATURALIZATION SERVICE,
Respondent.

Petition for Review of Order of the United States Immigration and Naturalization Service.

Before: Fahy, Senior Circuit Judge; Leventhal and Robinson, Circuit Judges.

JUDGMENT

This came came on to be heard on the record from the Immigration and Naturalization Service, and was argued by counsel.

ON CONSIDERATION THEREOF, It is ordered and adjudged by this Court that the order of the Immigration and Naturalization Service under review herein be, and it is hereby, affirmed.

Per Curiam
For the Court:
Nathan J. Paulson
Clerk

Dated: June 4, 1969.

Opinion per curiam.

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

August 8, 1968

File: A-8285609—Washington, D.C.

In re: CESAR ARTURO RAMIREZ

IN DEPORTATION PROCEEDINGS

APPEAL

APPLICATION: Adjustment of status under Section 245, I&N Act (8 USC 1255); voluntary departure

This is an appeal from the decision of the special inquiry officer finding respondent deportable as charged, denying his application for adjustment of status to that of a permanent resident under Section 245 of the Immigration and Nationality Act, and finally denying respondent's plea for the privilege of voluntary departure.

The respondent is a married male alien, age 34, who is a native and citizen of Ecuador and who entered the United States at Miami, Florida on or about February 23, 1965, as a nonimmigrant visitor for pleasure. After staying beyond the time authorized he was granted voluntary departure from the United States to be affected on or before March 17, 1966. He remained beyond that date without authority. Respondent admitted the allegations of fact contained in the Order to Show Cause and his deportability under Section 241(a)(2), Immigration and Nationality Act is proved by evidence that is clear, unequivocal and convincing.

Although respondent is a native of the Western Hemisphere, his application for adjustment of status under Section

245 was filed prior to December 1, 1965 and thus it is entitled to consideration under the Act of November 2, 1966, P.L. 89-732. The special inquiry officer held that although respondent was statutorily eligible for such adjustment of status the record did not warrant the favorable exercise of discretion and he denied the application.

Upon appeal, counsel for respondent, of course, contends that the respondent is entitled to have his status adjusted. Counsel for the Service contends that not only does the application not merit the favorable exercise of administrative discretion but that respondent is statutorily ineligible for such relief. This statutory ineligibility arises out of his conviction on January 20, 1967 in the District of Columbia Court of General Sessions, Criminal Division, of two crimes of false pretense. He was given a suspended sentence and placed on probation for six months.

We agree with the service that the aforementioned convictions render the respondent statutorily ineligible for relief under Section 245 of the Act, under Section 212(a)(9), Immigration and Nationality Act.[1] Respondent was convicted of two counts of false pretense under Section 1301, Title 22 of the District of Columbia Code. This section of the code makes intent to defraud an element of the crime of false pretense, and the two informations filed against respondent state that "Cesar A. Ramirez did on or about August 27, 1966 with *intent to defraud* falsely represent, knowing the representations to be false, that etc." He was convicted on both counts. It is settled law that where intent to defraud is an element of a crime then such crime is necessarily one involving moral turpitude.[2]

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[1] Sec. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: (9) Aliens who have been convicted of a crime involving moral turpitude.

[2] *Jordan v. DeGeorge*, 341 U.S. 223; 95 L.ed. 889 and cases cited therein.

Since respondent was convicted of *two* crimes involving moral turpitude he is not eligible for relief under the provision of Section 212(a)(9) which states that if the alien has been convicted of only *one* crime involving moral turpitude which crime is a misdemeanor classifiable of a petty offense, he can be issued a visa.

Since respondent was convicted of a crime involving moral turpitude he is not entitled to a grant of voluntary departure under Section 244(e) of the Act because of the automatic operation of Section 101(f)(3) of the Act which provides that a person who has been convicted of a crime involving moral turpitude cannot be regarded as a person of good moral character, a requirement for the grant of voluntary departure.

Accordingly, we will dismiss the appeal.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Acting Chairman